NO. 89-6679

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN EDWARD SWINDLER — PETITIONER

V.

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

I.

SWINDLER WAS AFFORDED EFFECTIVE COUNSEL.

Swindler first argues that he was afforded ineffective assistance of counsel at trial. He argues that counsel was ineffective in that he failed to investigate and offer evidence of mitigation at the penalty phase of the trial.

In order to succeed on a claim of ineffective assistance of counsel, Swindler must establish both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).

Swindler argues that counsel was ineffective for failing to put on allegedly mitigating evidence at the penalty phase of his trial. He asserts that counsel should have investigated and offered evidence at the penalty phase relating to a serious head injury sustained by Swindler in his youth. Swindler claims that evidence of the head trauma would have been relevant as a mitigating factor.

Lockhart notes that in the case of Darden v. Wainwright, 477 U.S. 168 (1986), this Court addressed a claim of ineffective assistance of counsel at the penalty phase of a capital murder case. It is clear that the Strickland

standards apply to the resolution of this issue. In Darden, the Supreme Court rejected the allegation of ineffective assistance of counsel because Darden had not overcome the presumption that it might be sound trial strategy to have a simple plea for mercy rather than present evidence in mitigation. Likewise, Swindler has failed to overcome that presumption in the present case.

The Arkansas Supreme Court rejected Swindler's claim in his petition for post-conviction relief because the argument was presented in a conclusory fashion Swindler, 272 Ark. 340, 344, 617 S.W.2d 1, 3 (1981).

While it is true that no evidence was presented at the penalty phase of the trial, counsel for Swindler testified at the evidentiary hearing that he believed that sufficient evidence had been offered at the guilt phase of the trial and that it was unnecessary to put on any additional evidence. (E.H. 27-30) Counsel also indicated that although the report from the State Hospital was available and could have been offered into evidence, he believed it was more damaging than helpful regarding mitigation. (E.H. 15)

Counsel's penalty phase closing appears in the record at T. 2224-36. Counsel argued that Swindler was under an emotional disturbance and that he had a mental condition. Counsel referred to the head injury Swindler had suffered as

a child. (T. 2230) Counsel argued the Swindler had been drinking the day of the shooting and, thus, that intoxication was a mitigating factor. (T. 2231) Counsel also referred to Swindler's lack of education. (T. 2232) Counsel mentioned the fact that Swindler had been in prison most of his life and that this made him unable to interact in society well. (T. 2233) Counsel also mentioned the abuse that Swindler claimed to have suffered upon being arrested. (T. 2233-34) Counsel pointed out that Swindler had not attempted to harm the witnesses to the shooting which counsel noted was common in many other cases. (T. 2235) Counsel also argued that the death penalty served no deterrent value. (T. 2235-36) A review of counsel's closing argument establishes that he mentioned those points in mitigation that had been developed at trial.

Counsel did not err in failing to put on evidence of mitigation. Swindler has not demonstrated any evidence that was available to counsel that was not offered to the jury and argued by counsel.

The District Court noted that Swindler had failed to show that any evidence existed which could have been introduced at his trial. Moreover, the District Court found that counsel had exercised reasonable trial strategy in not admitting the State Hospital report which contained damaging information. Swindler, 693 F.Supp. 766, 769 (E.D. Ark.

1988). See Petitioner's Appendix I at 42-43.

The Eighth Circuit rejected Swindler's claim as well. Swindler v. Lockhart, 885 F.2d 1342, 1352-53 (8th Cir. 1989). See Petitioner's Appendix I at 19-21. The Eighth Circuit properly applied the Strickland standards in reviewing Swindler's argument. Swindler has failed to demonstrate any basis for this Court to grant certiorari.

II.

SWINDLER'S SECOND MOTION FOR A CHANGE OF VENUE WAS PROPERLY DENIED.

As his second argument, Swindler argues that he was denied the right to be tried by an impartial jury when the trial court denied a motion for a second change of venue. Swindler argues that he was entitled to a second change of venue because of adverse pretrial publicity surrounding his case. The District Court in a thorough opinion on this issue denied habeas corpus relief. Swindler, 693 F.Supp. at 763-66. See Petitioner's Appendix I at 28-35. The District Court was correct in denying habeas corpus relief and Lockhart asserts that the Eighth Circuit properly affirmed the judgment.

Swindler's first conviction was reversed by the Arkansas Supreme Court because the trial court failed to grant a change of venue and because the court failed to excuse three jurors. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978). On remand to the trial court, venue was moved to

Scott County from Sebastian County. At his retrial, Swindler made an oral motion for a change of venue for the first time on the first day of voir dire after only nine veniremen had been examined and excused for cause. The Swindler also moved for a mistrial. The trial judge denied the motions because it was not apparent to him that it would be impossible to seat an impartial jury in that county. (T. 751-52) Swindler renewed his motion for a change of venue or for a mistrial five times before the jury was selected in his case.

At the conclusion of the first day of voir dire, when no jurors had been selected, the trial court denied the renewed motion for two reasons: (1) Arkansas allowing only one change of venue to an adjoining county; and (2) the motion was premature, i.e., only twenty veniremen had been examined, Swindler had used only four peremptory challenges, and the State had used only two. The court believed that the better course was to continue the voir dire the next day and see what progress could be made toward selecting a jury. (T. 878-79)

After the second day of voir dire, two jurors had been selected. Swindler had exercised eight peremptory challenges and the State had exercised four. Swindler again moved for a change of venue or for a mistrial. (T. 1071-73) The trial court denied the motion as follows:

> Also, as you have correctly pointed out, under Arkansas law a defendant is only entitled to one change of venue, and the court feels that by the news media, and the advances that have been made, and the television, that perhaps there needs to be some changes perhaps made in the law.
>
> * * *
>
> I do want to proceed again tomorrow and see what progress, if any, can be made in the selection of the jury, then if the court is convinced that a jury cannot be obtained here, that jurors here do not have opinions or would be qualified to serve, then the court would face the legal matter as to whether or not the rights you assert under the United States Constitution are such that it could be done contrary to the provisions of law.

(T. 1074-75)

This quotation clearly reflects the trial court's willingness to consider a change of venue if it became apparent that an impartial jury could not be seated despite Arkansas' statute prohibiting a second change of venue.

After the third day of voir dire, five jurors had been seated. Swindler still had three peremptory challenges. Swindler again moved for a change of venue or for a mistrial. (T. 1213-14) Once again the trial court stated that the proper way to handle the case would be to continue jury selection the next day to see what progress could be made. (T. 1214) Although the court did not reiterate its reasons for overruling the motion, it gave Swindler the right to renew his motion at any time, depending on the

development toward the selection of the jury. (T. 1215)

At the conclusion of the fourth day of voir dire, ten jurors had been chosen. Swindler had exhausted eleven of his peremptories and the State had exhausted six of its challenges. Swindler moved the court to declare a mistrial and to change the venue to another county where he could obtain a fair trial by a impartial jury. (T. 1405-07) The trial court overruled the motion with the following remarks:

> We have been able to seat ten jurors, and the Court has tried as best I know how to excuse any juror that I did no feel, or that I felt should be excused, based on the vast amount of publicity this matter has received. So for the purpose of the record I am not granting our motion today, based on the fact not particularly on the fact of the constitutional question of the law, but on the fact that I feel like that we are making good progress towards getting a jury, one that will be qualified under the case.

(T. 1408-09)

After the fifth day of voir dire, twelve regular jurors and one alternate juror had been chosen. Swindler had exhausted all twelve of his peremptory challenges in the selection of the regular jurors and had exhausted his one peremptory challenge in the selection of the alternate juror. The State had exhausted seven of its peremptory challenges. Swindler once again renewed his motion for mistrial because of jury bias and prejudice and based on the

unconstitutionality of the venue statute. (T. 1528) Swindler then moved to introduce defense Exhibits 1-5 which showed the following: the population of Scott County; the jury lists for the week together with defense counsel's notations regarding those who had been excused for cause, by peremptory strikes, etc.; a list of additional prospective jurors drawn; and a list of prospective jurors excused for business or personal reasons. The exhibits were admitted into evidence. (T. 1542-55) However, the trial court again overruled Swindler's motion with the following comments:

> Again, it is of course apparent, it is quite obvious that this case has received great amounts of publicity, and it is very difficult to find a juror, not only Sebastian County but apparently throughout this part of even the western part of Arkansas, who had not read, heard or seen a great deal about it. And the Court was confronted with the proposition with the publicity that; has been received to try to see that a jury was selected under the circumstances that no opinion about the case or were able to set it aside. And I feel that the Court when there was any doubt or any question at all in that regard has resolved it by excusing the jurors. so I going to hold, Mr. Langston, and the Court understands of course that what you are asking this court to do is to declare the Arkansas statute unconstitutional, and uphold that this case must be transferred to some county not an adjoining county but outside the district, which the Court believes would cause a serious jurisdictional problem. But I am holding that based upon the present Arkansas law and the record that was made in this court in the selection of the jury that your motion should be

denied, and it will be denied in this case.

(T. 1559-60)

To review, 120 jurors were examined on voir dire in Swindler's case for the selection of the twelve regular jurors. Of those 120 jurors, 79 were excused for cause. However, four were excused for cause by the State because of their opposition to the death penalty. The District Court also correctly noted that a number of the potential jurors were excused for reasons not related to pretrial publicity about the crime. Swindler, 693 F.Supp. at 764. See Petitioner's Appendix I at 30-32. Swindler excused twelve peremptorily and the State excused seven peremptorily.

It is also important to note that Swindler's retrial was held in October of 1978. The crime had occurred in September of 1976. Thus, more than two years had passed between the crime and the second trial.

The twelve regular jurors chosen in Swindler's case were:

1. Robert Oliver (T. 955-66)
2. Henry Sunderman (T. 971-8)
3. Gean Roderick (T. 1097-1115)
4. Thurman Jones (T. 1146-64)
5. Leonora Pica (T. 1187-98)
6. Bobby Hunt (T. 1204-20)
7. Milton Staggs (T. 1222-40)
8. Walter Goodard (T. 1254-67)
9. Ardell Martin (T. 1267-84)
10. L. D. Casey (T. 1324-37)
11. Cora Owens (T. 1413-28)
12. John Sherrill (T. 1477-78)

Of these twelve jurors, all twelve were ultimately announced

"good" by both Swindler and the State. However, Swindler did move to excuse three of the twelve for cause before they were accepted. (Sunderman, T. 985; Jones T. 1153-64; Staggs, T. 1240-41). The Swindler had peremptory challenges remaining in each instance and did not exercise them. The thirteenth juror (alternate) was Mary Wilson (T. 1489-99). She was excused from service before the deliberations began.

Lockhart acknowledges that approximately 66% of the 120 jurors examined were excused for cause. However, Lockhart maintains that the jury selected to hear Swindler's case was fair and impartial. The voir dire establishes that Swindler was not entitled to a change of venue because the jurors seated in the Swindler's case could give him a fair trial.

On direct review, the Arkansas Supreme Court rejected Swindler's argument that he had been tried by an impartial jury and upheld the trial court's determination that the Swindler was not entitled to a change of venue. Swindler v. State, 267 Ark. 418, 424-28, 592 S.W.2d 91, 94-96 (1979).

It is clear beyond all question that the trial court's determination as to the individual juror's qualifications to be seated in a particular case is subject to the presumption of correctness of 28 U.S.C. §2254(d). In Patton v. Yount, 467 U.S. 1025 (1984), this Court specifically addressed the issue of alleged bias due to pretrial publicity. The Court

held that a trial court's finding that the jurors were qualified to be seated is a factual finding subject to the presumption of correctness. Thus, the District Court properly applied the presumption of correctness to the state court's findings of fact in this case.

In the case of Irvin v. Dowd, 336 U.S. 717, 722-23 (1961) this Court noted as follows:

> It is not required that the jurors be totally ignorant of the facts involved ... To hold that the mere existence of any preconceived notion as to guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can a lay aside his impression or opinion and render a verdict based on the evidence presented at court.

The Supreme Court has addressed the pretrial publicity issue on numerous occasions since that time. See Dobbert v. Florida, 432 U.S. 368 (1979); Murphy v. Florida, 421 U.S. 794 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966). The gist of these cases is that the defendant must demonstrate the nature and extent of the publicity that he claims biased the jury. There is no evidence in Swindler's trial record to establish the nature and extent of the pretrial publicity. The only evidence in the record at all is that gleaned from the answers of the prospective jurors on voir dire. Although it is true that as many as 98 of the 120 jurors did have some knowledge of Swindler's case, that is

simply not enough to establish that the jury was impartial under the rule announced in Irvin and in the cases following Irvin.

As outlined above, an examination of the voir dire of the twelve seated jurors clearly establishes that each could render a verdict based on the evidence presented. That is sufficient to establish the impartiality of Swindler's jury. Because Swindler cannot demonstrate that he was tried by a biased jury, he cannot establish that the location (venue) of his trial was improper.

Based on the foregoing argument, Lockhart asserts that the District Court was correct in concluding that Swindler was not entitled to a second change of venue. Therefore, the Eighth Circuit properly affirmed the judgment denying habeas corpus relief. See Swindler, 885 F.2d at 1347-48. See Petitioner's Appendix I at 7-11. As such, Swindler has failed to establish any reason for this Court to exercise its certiorari jurisdiction.

III.

JURORS SUNDERMAN, JONES AND STAGGS WERE PROPERLY SEATED ON SWINDLER'S JURY.

Finally, Swindler argues that his rights under the Sixth and Fourteenth Amendments were violated because certain jurors were seated after he had exhausted his peremptory challenges who were biased against him and who should have been excused for cause.

Swindler correctly notes that he exhausted his peremptory challenges when he excused venireman John Montgomery (T. 1465). At that point, eleven jurors had been seated. However, contrary to his argument, the record does not reflect that any jurors were seated after he had exhausted his peremptory challenges that he would have excused if he still had peremptory challenges remaining. Each of the jurors about whom Swindler complains - Henry Sunderman (T. 971-85), Thurman Jones (T. 1146-64), and Milton Staggs (T. 1222-40) - were challenged for cause before Swindler exhausted his peremptory challenges. Thus, when the trial court denied his for-cause challenge, Swindler could have excused the jurors peremptorily but did not. Instead, he accepted each of the three jurors as being "good" for the defense. (T. 985, 1163-64, 1240-41)

Arkansas follows the rule that in order to demonstrate prejudice from the denial of a juror challenge, a defendant must establish that, after he exhausted all of his peremptory challenges, he was forced to accept a juror that he would have excused if he had had a peremptory challenge remaining. See Fairchild v. State, 284 Ark. 289, 292, 681 S.W.2d 380, 382 (1984); Singleton v. State, 274 Ark. 126, 623 S.W.2d 180 (1981); Conley v. State, 270 Ark. 886, 607 S.W.2d 328 (1980). Swindler has failed to make such a showing.

However, Lockhart notes that the record in this case establishes that the trial court correctly denied Swindler's for-cause challenge in the case of each of the three disputed jurors. Swindler claims that each juror should have been excused for cause based on his opinion as to his guilt. Once again, Lockhart asserts that the language found in Irvin v. Dowd, 366 U.S. 717, 722-23 (1961) is appropriate here. The Court stated that:

> It is not required that the jurors be totally ignorant of the facts involved ... To hold that the mere existence of any preconceived notion as to guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented at court.

Moreover, the trial judge's decision not to excuse the three jurors is entitled to the presumption of correctness accorded a state court's findings of fact.

An abstract of the voir dire of each of the three questioned jurors is submitted below:

A.

Henry Sunderman testified as follows:

The only thing I know about this case is what I read in the newspaper and T.V. I do not have an opinion about the

case. I work at SWEPCO here in Waldron and have for 16 years. (T. 971-972)

I remember from the news accounts that the altercation that took place was at a service station and I remember the names that were mentioned, and the T.V. and news accounts of this. The names that I remember were Randy Basnett and Mr. Swindler. I was living in Scott County at the time and I saw this on television. I get the cable and I was watching this on Channel 5 from Fort Smith. I watch the news every day. I usually look through the newspaper every day. I remember that Mr. Swindler was from North or South Carolina. I remember that there were some charges that had been brought against him in that state. I remember it was some sort of assault charges. (T. 975-977)

I talked to other people and discussed the case. Other people expressed opinions to me about it. The ones that discussed it with me, particularly, I would say, after the trial that they were convinced. This was discussed like any other news item. People still express their opinions to me. The majority of them were that they felt that he was guilty. No one to my recollection stated that he was not guilty. I would say that I probably did express an opinion when I was discussing the case. At that particular time I feel that I was of the opinion that he was guilty. I did not hear all the evidence at that time, and based on what I

did hear at the particular time I had an opinion at that time; at this time I would base my opinion on the evidence that was presented. (T. 977-979)

I followed the reports of this case when it was first tried to some degree. I feel like any jury that hears the evidence that is presented to them, twelve people come to the same conclusion, that I feel like, they have made a decision based on what the facts that there were aware of. I would say that I feel like because they came to the conclusion that the defendant was guilty, that he may well be guilty. I have the opinion that the twelve, based on the facts that were presented to them, made a decision based on those facts. I had my opinion at that time, and I feel like if I sit on any jury, it would be my duty to make my decision at that time, based on the facts that were presented to me, not what had been presented somewhere else. I would not consider what another jury had considered and what their verdict was. (T. 979-980)

I hope my prior opinion would not prevent me from weighing the evidence. I hope it would not get in the way of my deliberations. I think I cannot tell you that a thought would not cross my mind. I would do my best not to compare whatever evidence was presented in court to whatever I heard from the media. I don't think I could tell you without a shadow of doubt that I would not compare the

evidence with what I heard in the media. (T. 980-981)

If I were sitting on the jury I would weigh the evidence that was presented to me in the courtroom, and not what had been carried on T.V. or in the newspaper. (T. 981-982)

The defendant moved that the juror be excused for cause and the trial court overruled the motion and he was selected as a juror. (T. 985)

B.

Thurman Jones testified as follows:

The facts I know about the case are from newspaper and television. I subscribe to the Fort Smith paper. The only opinion I could form is that the man was guilty because the jury found him guilty. I guess I have that opinion right now. I would hope that it would be true that I could set aside my opinion. I didn't hear the evidence before and I don't know what they based that decision on. I think I could base my decision on what happens here. (T. 1146-47)

I am not too hep on the death penalty, but I think in certain cases I would believe in it. In some kind of cases I think it is a proper punishment. It would have to be an extreme case before I would go for the death penalty. (T. 1148)

I have seen this case on T.V. and in the newspaper. I read accounts of it in the Fort Smith Times Record. I have not completely read an account until yesterday. The only

complete article I have read in this case I read just yesterday. I remember from the account that a police officer was shot in Fort Smith. I read where the man took off and they caught him down in the bottoms. And that they arrested the man, and put him in jail. And then they sent him to Little Rock for a sanity test for 30 days. I also read that he was accused of killing two more in South Carolina. I heard they were teenagers. I guess I discussed the case with other people. I have had several people express their opinion in my presence. If they had told me he was guilty on anything, it wouldn't amount to anything as far as I am concerned. That is their opinion. I never heard anyone say that he was not guilty. (T. 1152-1154)

I formed the opinion when he was convicted that he was guilty. I am referring to the trial in Sebastian County. It is not for me to decide whether he needs a second trial; that is up to the Supreme Court to decide that. So that is not my prerogative. I cannot give this man the same presumption of innocence that I could have had he not been convicted. I am not saying that I cannot presume him innocent. The only thing, I have not considered in my mind whether or not the man is guilty or innocence (sic). The only thing I assume I don't know of any other assumption I could be under with what I have hard, and read, except that he was guilty. That is my opinion. (T. 1155-1156)

What I have told you before is I would take what happened in this courtroom, and when the Judge gives the instruction to the jury I would follow the Judge's instructions and the law to the best of my ability. I don't think that it would be necessary for me to be able to put out of my mind what I have read or heard. My mind is not something I erase one morning, and get up the next morning and start writing it again. My mind doesn't operate that way. I wouldn't be remembering what I have heard. When I told you that if I was put on that jury I would listen to what was said, and base my opinion on that. I don't think I would consider anything I had heard. I don't know anything about the evidence of the previous trial. (T. 1156-1158)

The defendant moved to excuse the juror for cause and stated as grounds that he thought his answers had been contradictory, and that he had too much information about the defendant's background. (T. 1163-1164) The motion overruled by the trial court. He was selected to serve on the jury. (T. 1164)

C.

Milton Staggs testified as follows:

I heard a little bit about the facts on the news, read a little in the paper. I don't really know how to answer the question of whether I have an opinion or not. Based on what came out I do have an opinion. I don't know how it could be

otherwise. I believe I could set my opinion aside. (T. 1222-1223)

I just saw some of the skits on T.V. about the case, I read the Fort Smith Times Record paper about it. I just get Channel Five from Fort Smith. I remember from the accounts about a policeman getting shot, and really I didn't keep up with a lot about the trial situation. I did some, but I couldn't offhand tell you. That's all I did. I kept up and say that caught a person. They got the person they said did it and it was Swindler the defendant. (T. 1230-1232)

I probably did discuss this case with my wife. I did discuss it some with other people. I really didn't express an opinion to anyone else. I did hear about another incident or two about the defendant, someone was telling me about it. I just heard there was two more people that had been killed by him. (T. 1232-1233)

Based on what I have heard and seen, I would have to have a little bit of an opinion. My opinion would be that it would have to be like it came out. I have an opinion to an extent. Not that I couldn't change it if it was different, but you would have to some confidence in the people. I don't believe I would have difficulty getting rid of my opinion. I can accept facts. I would not require anything from the defendant before I set aside my opinion. I wouldn't pay any attention to my opinion, because if I

listen to that, I would listen to the facts that are brought out. I would only want to hear what went on at the present. (T. 1235-1236)

The defendant moved that the juror be excused for cause. (T. 1240) The motion was overruled and he was selected as a juror. (T. 1241)

Although a review of the voir dire of the three jurors does reflect that each juror had some motion that Swindler was guilty based on what he had heard, each juror also stated that he could lay aside his impression or opinion and render a verdict based on the evidence presented in court. Thus, under the rule announced in Irvin v. Dowd, supra, Lockhart asserts that each of the challenged jurors was properly seated on Swindler's jury. Moreover, when the presumption of correctness is applied to the state court's determination that the jurors were properly seated, Swindler's arguments must be rejected.

In reviewing this claim, the District Court applied the presumption of correctness and the standard set out in Irvin v. Dowd, supra. The District Court also stated that it had reviewed the voir dire and found no manifest error. Swindler, 693 F.Supp. at 766. See Petitioner's Appendix I at 35-36. The Eighth Circuit affirmed the District Court's judgment finding that the presumption of correctness was properly applied to the trial court's determination that the

jurors should not be excused. The Eighth Circuit determined that there was fair support in the trial record for the trial judge's decision to seat the questioned jurors. Swindler, 885 F.2d at 1348-50. See Petitioner's Appendix I at 12-15.

Based on the foregoing, Lockhart asserts that this Court should deny certiorari.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. This case contains no issues worthy of such review. The points raised by the petitioner do not demonstrate that constitutional error has occurred. Therefore, for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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February 28, 1990

Mr. Joseph Spaniol, Jr.
Clerk
United States Supreme Court
No. 1 First Street, N.E.
Washington, D.C. 20543

RE: John Edward Swindler v. A. L. Lockhart
No. 89-6679

Dear Mr. Spaniol:

Please find enclosed for filing are twelve copies of the respondent's brief in opposition to the petition for writ of certiorari in the above-styled case. Opposing counsel has been served as indicated on the enclosed certificate of service.

Sincerely,

Jack Gillean

JACK GILLEAN
Assistant Attorney General
(501) 682-5321

JG:dc
enclosure

cc: Honorable Thurman Ragar, Jr.
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P.O. Box 796
Van Buren, AR 72956-0796

NO. 89-6679

IN THE SUPREME COURT OF THE UNITED STATES

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V.

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION — RESPONDENT

CERTIFICATE OF SERVICE

I, Jack Gillean, a member of the Bar of the Supreme Court of the United States and counsel for record for respondent herein, hereby certify that on February 28, 1990, pursuant to the Rules of the Supreme Court, I served one copy of the attached Brief for Respondent in Opposition to Petition for Writ of Certiorari, on the petitioner herein as follows:

By depositing copies of the brief in the United States Post Office, Little Rock, Arkansas, with first class postage prepaid, properly addressed to the Honorable Thurman Ragar, Jr., P.O. Box 796, Van Buren, Arkansas 72956-0796, the petitioner's counsel of record.